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Denters, H.M.G.

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The Sutherland Report

ERIK DENTERS*

Abstract

In early 2005 a Consultative Board presented a report (the Sutherland Report) on the functioning of the WTO and means to improve its efficiency. The author summarizes the Board's key findings and reflects on its main recommendations. The Board discusses sovereignty and globalization in the context of the world trading system. In addition it finds that the WTO needs to reconsider its institutional framework and some concepts underlying the organization. The Board particularly urges the WTO to address the erosion of the most-favoured-nation treatment through the proliferation of the preferential trade agreements. Transparency and civil society, dispute settlement, decision-making, efficiency, and the role of the Director-General and the secretariat are also discussed. The author concludes that the Board focuses on economic consequences of trade liberalization but fails to address the harmful effects of globalization. He agrees with the Board that institutional reform is required, but concludes that it would have been helpful if the Board had offered clearer direction on how to improve the decision-making process.

Key words

globalization; international economic law; international trade; Sutherland Report; World Trade Organization

In early 2005 a Consultative Board to the World Trade Organization (WTO) Director-General presented its report¹ on the functioning of the WTO and means to improve its efficiency. In his Foreword the Director-General, Supachai Panitchpakdi, says that the tenth anniversary of the WTO is an appropriate moment for reflection and renewed commitment. The report comes at a timely moment for another reason: recent ministerial conferences have ended in acrimony and overall progress in the Doha Development Agenda² has decelerated.

The board was chaired by former Director-General Peter Sutherland and was composed of scholars, practitioners, and representatives of the business community.³ Its report – the Sutherland Report – follows two tracks. First, it reviews fundamental concepts of international law and policy that need clarification in the context of the WTO. The perceived perils of globalization and the need to safeguard sovereignty, traditionally put forward by critics, are obvious themes. Second, the report emphasizes that progress is required in the fields of the

* Associate Professor of International Law, Vrije Universiteit (Free University) Amsterdam.

1. The Future of the WTO – Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General, Supachai Panitchpakdi, XII–2004 (hereafter Sutherland Report).
2. Declaration and Work Programme of the Ministerial Conference at Doha, WT/Min/(01)/DEC/1 of 20 November 2001.
3. The members were Peter Sutherland, Jagdish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer, and Thierry de Montbrial.

decision-making process, dispute settlement, and co-ordination with other relevant intergovernmental organizations. In addition, some improvements in the participation of non-governmental organizations (NGOs) in the WTO rule-making process are suggested.

Chapter I discusses globalization, poverty, and environmental issues, concerns that are particularly raised by NGOs. The report holds that liberalizing international trade will benefit members, but care must be taken to create safety nets. Chapter II explains the erosion of the most-favoured-nation (MFN) treatment, a process that weakens a non-discriminatory world trading system. In Chapter III the report explains how the WTO may restrict the exercise of sovereignty, a development that has worried many WTO members. The examination of coherence and co-ordination with intergovernmental organizations – ‘horizontal co-ordination’ – in Chapter IV is an attempt to elevate the WTO to the same footing as the IMF and the World Bank, while Chapters V–IX elaborate on transparency and civil society, dispute settlement, decision-making, efficiency, and the role of the Director-General and the secretariat. This article summarizes the key findings in the report and reflects on its main recommendations.

I. GLOBALIZATION, SOVEREIGNTY, TRANSPARENCY AND CIVIL SOCIETY

The report takes a defensive position by explaining that globalization and an open trading system are not a threat, but on the contrary will produce more prosperity. It offers questions and produces answers which would fit in a pamphlet celebrating the achievements of free trade. Is open trade a threat to human rights? Does it harm the interests of the poor? Does the WTO cause a ‘race to the bottom’ in terms of trade standards? Can trade and environmental protection coexist? The report pretends to have the answers, although it acknowledges that safeguards are necessary to reverse damaging consequences. The bottom line is that free trade prevails, provided that adequate safeguards are in place.

The report addresses the concern that sovereignty is eroded under the WTO system. This issue came up when states were forced to accept decisions of the Dispute Settlement Understanding (DSU) on environmental protection and food safety. The report holds that international law both creates and restricts sovereignty, but reassures that ‘it is still recognized that the state is still central to the current international law structure’.⁴ On the other hand sovereignty must be constrained in order to facilitate action at an international level; cross-border environmental protection or management of the global commons are obvious concerns that require concerted action. The report even presents the argument that globalization is inescapable and, consequently, international institutions are needed to control international processes, whether we like it or not. Still, the report maintains that sovereignty

4. Sutherland Report, *supra* note 1, para. 113.

continues to play a role:

In committing to the WTO and its procedures and disciplines, governments are returning to themselves a degree of 'sovereignty' lost through the process of globalization. If governments are losing the capacity to regulate meaningfully at the domestic level, they are reclaiming some control of their economic destinies at the multilateral level.⁵

Transparency and dialogue with civil society are discussed in Chapter V. Through its policy on de-restriction of documents and its outstanding website, the WTO communicates with the outside world. More direct communications with civil society have been developed at a rapid pace. Currently the WTO is one of the few organizations that provides in its constitution (Article V.2) the right of NGOs to consult. The report acknowledges that NGOs have played an effective role in 'building caucuses and in influencing governments to shift positions and strengthening their commitments to agreed rules'.⁶ This is particularly true for NGOs close to decision-making centres in Brussels and Washington. But there are caveats. First, some NGOs are not well informed and do not offer constructive advice. Second, there is a risk that excessive involvement of NGOs complicates negotiations. The report says that negotiations must be restricted to government level and that opening up parallel tracks through which NGOs tend to operate is counterproductive. Third, many NGOs themselves lack transparency. Whom do they represent, who funds them, and what is their agenda? Fourth, the report points at limitations in NGO involvement. It argues that trade diplomacy 'requires some level of confidentiality', and NGOs cannot be fully involved in the negotiating process. 'Therefore, civil society is likely to be frustrated by being left out of the deal making'.⁷ The report seems to imply that frustration may easily turn into resentment against whatever the outcome of negotiations is.

2. DECISION-MAKING AND EFFICIENCY

An overarching theme is the lack of progress in the current Doha round. Several reasons are identified. First, WTO membership has almost doubled since the start of the Uruguay Round in 1986 and is no longer dominated by developed countries that have a matching agenda. Developing countries, becoming more assertive and understanding the issues at stake, know how to play the game of trade diplomacy. By the use of training and technical assistance offered by the WTO and the assistance of consultancy services, developing countries have gained an upgraded negotiating power.⁸ NGOs control funds and offer technical facilities to assist developing countries in trade diplomacy. At political level NGOs encourage developing countries to resist compromises that do not take into account their interests.

A second reason refers to the requirement of consensus in the legislative process. In the WTO 'consensus diplomacy is predominant and almost exclusive'.⁹ Article IX

5. Ibid., para. 140.

6. Ibid., para. 194.

7. Ibid., para. 200.

8. Ibid., para. 274.

9. Consensus is reached if no member present at the meeting when the decision is taken formally objects

of the Agreement Establishing the WTO stipulates that WTO bodies¹⁰ shall decide by consensus, and accepts majority decision-making as a second option only.¹¹ In practice WTO members are reluctant to decide by majority and the report also believes that this is undesirable. The avoidance of voting can be explained by the fact that the system of one state—one vote does not reflect the economic reality of the world trading system. It would be quite unacceptable that the major industrialized countries would be outvoted when important decisions are being taken.¹²

The report acknowledges that progress can be frustrated by legislative activities, but holds that departing from consensus is objectionable because it undermines negotiating strategies or would force members to accept obligations which they cannot possibly meet.¹³ The report offers some remedies by proposing distinctions between types of decisions and requiring members to invoke a 'vital national interest' when they block a decision requiring consensus. However, decision-making in a meeting with most WTO delegates present, each possessing the power of veto, will continue to be an arduous process. The report suggests the development of a constituency structure based on the representation of regional trade agreements and other regional groups. This probably implies that groups of WTO members will have to speak with a single voice. The report does not elaborate on this important proposal, but advises the Director-General to explore the potential for increased co-ordination and group representation.

The inertia caused by consensus diplomacy is a direct threat to the political process on which a new trade agenda depends. The report expresses the belief that the process can gain momentum through more frequent ministerial conferences. These should be carefully prepared by a consultative body of senior officials. Efficiency could be improved by creating closer bonds between the WTO secretariat and ministerial conferences. In the final chapter the report pleads for a more active WTO secretariat, offering more intellectual input, and a stronger presence in trade negotiations of the WTO, which should have 'a convincing and persistent institutional voice of its own'.¹⁴ For that matter, only technical competences and appropriate experience should be decisive criteria for the appointment of a Director-General.

3. THE EROSION OF MFN STATUS: PREFERENTIAL TRADE AGREEMENTS

The WTO as a global institution operates in a dynamic environment. As the volume of international trade increases and creates more incentives for, and threats to,

to the proposed decision. Absence or abstention does not prevent consensus. See T. Cottier and M. Oesch, *International Trade Regulation* (2005), 101.

10. The main WTO organs are plenary bodies, i.e. the Ministerial Conference and General Council are both composed of representatives of *all* the members.

11. When formal voting takes place, each WTO member has one vote. Examples of decisions are interpretations of the WTO Agreement or the Multilateral Trade Agreements, proposals for amendment of these agreements, a waiver of an obligation imposed on a member, or the accession of new members.

12. Cottier and Oesch, *supra* note 9, at 103.

13. Sutherland Report, *supra* note 1, para. 287.

14. *Ibid.*, para. 361.

domestic economies, the WTO should respond to such changes. Environmental and health concerns, human rights, and security demands may affect trade relations and must be addressed by the WTO. Other trade-related aspects cannot be ignored. The 2001 Doha Work Programme set up working groups that were assigned to address investment, competition policy, government procurement, and trade facilitation. Hitherto, progress on these issues has been negligible and has frustrated members that want to move forward. In the report (other) members are blamed for the lack of interest. 'Despite assurances to the contrary, ministers often devote far more time to bilateral and regional trade deals than to ensuring the multilateral system delivers worldwide results'.¹⁵ The report concludes that the WTO as a platform for trade negotiations has become less attractive because progress is slow and unpredictable.

A logical response to the frustration of members is the search for 'trade relationships that are broader and deeper than is easily achievable on a global scale'.¹⁶ This resulted in the creation of preferential trade agreements (PTAs) between groups of WTO members. A typical PTA is a trade agreement between two or more members mutually offering special (and usually better) trade preferences than under the WTO commitments. The motive for agreements of this kind is the desire to create political bonds or to intensify regional integration.

PTAs are *prima facie* a violation of the non-discrimination clause expressed as the MFN clauses under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).¹⁷ However, the WTO allows the existence and creation of PTAs subject to certain conditions. Article XXIV of GATT exempts from MFN obligations members that create or have created a PTA, provided that it covers 'substantially all the trade'. A similar provision appears in Article V of the GATS. Initially drafters believed that Article XXIV of GATT would be invoked occasionally for a limited number of PTAs only. The reality was that since the establishment of the WTO this provision has hardly had a disciplinary effect and caused an 'explosion' of PTAs in which virtually all WTO members participate.¹⁸

The report speaks disconcertingly about the proliferation of PTAs. The 'spaghetti bowl' of PTAs (customs unions, common markets, regional and bilateral free trade areas, or whatever name is given to an arrangement) now comprises more than 300 and has substantially reduced the significance of MFN status. The report comes to a remarkable conclusion: 'The reality today is that the WTO presides over a world trading system that is far from the vision of the architects of GATT. This is best illustrated by reference to the EU, which now has its MFN tariffs fully applicable

15. Ibid., para. 316.

16. Ibid., para. 62.

17. These provisions stipulate that WTO members must immediately and unconditionally accord treatment no less favourable than the treatment which they accord to like products/services of any other member.

18. The website of the WTO reports that 'By July 2003, only three WTO members – Macau China, Mongolia and Chinese Taipei – were not party to a regional trade agreement. The surge in these agreements has continued unabated since the early 1990s. By May 2003, over 265 had been notified to the WTO (and its predecessor, GATT). Of these, 138 were notified after the WTO was created in January 1995. Over 190 are currently in force; another 60 are believed to be operational although not yet notified. Judging by the number of agreements reportedly planned or already under negotiation, the total number of regional trade agreements in force might well approach 300 by 2005.' (http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm (accessed 10 April 2005).

in only nine trading partners, albeit including the US and Japan'.¹⁹ After putting forward some considerations on economic theory the report concludes that PTAs have advantages and disadvantages for the world trading system. The bottom line is inconclusive: PTAs may be 'building blocks' or 'stumbling blocks'. The process of 'competitive liberalization' is constructive and suggests that PTAs will be followed by further liberalization on a global scale and, accordingly, will advance the objectives of the WTO in the long run. On the other hand 'the unregulated proliferation of PTAs tends to create vested interests that make it more difficult to attain meaningful multilateral liberalization . . . [these interests] undermine transparency and predictability in international trade relations'.²⁰

The report suggests two means of combating the proliferation of PTAs. First, a substantial breakdown of WTO tariffs and non-tariff measures could render many PTAs futile and effectively promote MFN status; when a WTO tariff is close to zero then a PTA could hardly bring greater trade benefits. This presupposes a willingness of WTO members rigorously to break down tariff and non-tariff barriers. The report acknowledges that there is little reason to believe that on this point progress will be made. It also points at an inherent opposition to driving back the number of PTAs: members benefiting from special trade arrangements will resist giving up their position and yielding to the general non-discrimination clauses of the WTO. A second suggestion is the review of all PTAs against a restrictive interpretation of Article XXIV. The result could be a 'shake-out' of all PTAs unable to meet the threshold of the 'substantially all the trade' clause.

4. THE EROSION OF MFN STATUS: THE ENABLING CLAUSE

A second category of special trade benefits that constitute a *prima facie* violation of MFN status follows from the provisions on special and differential treatment of developing members. The General System of Tariff Preferences (GSP) was incorporated into GATT in the 1970s, because parties then believed that developing countries should be treated with special care, considering the economic consequences of trade liberalization. The enabling clause, creating the legal framework for the GSP, has given the GSP a permanent place in the WTO. Like a PTA, it creates an exception to MFN treatment. It allows for 'discriminatory' trade benefits which are 'generalized, non-reciprocal and non-discriminatory . . . to the developing countries'.²¹ The term 'non-discriminatory' implies that identical tariff treatment must be available to all GSP beneficiaries with a comparable 'development, financial [or] trade need'.²²

The report doubts the economic rationale of the enabling clause because it appears to have little effect on the beneficiaries. There is also reason to distrust the motive behind the granting of preferences by developed countries, because political rather

19. Sutherland Report, *supra* note 1, para. 74.

20. *Ibid.*, para. 84.

21. See footnote 3 of paragraph 2(a) of the enabling clause.

22. This was clarified in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries. Report of the Appellate Body AB-2004-1.

than benevolent economic motives can lie behind preferential treatment. The United States and the European Union offer special and differential treatment to their allies in exchange for political subservience. Another aspect is the 'variable approach' to special and differential treatment. The report notes that in the case of a conflict arising between the grantor and the grantee preferential treatment may be ceased instantly. In the final analysis the interests of developed countries appear to prevail over those of developing countries. The report therefore proposes an acceleration in the process of graduation through which more developing countries give up their special status and accept the mainstream obligations of WTO.

5. VARIABLE GEOMETRY

The report puts its finger on a soft spot. PTAs and the enabling clause are open-ended arrangements; the number of arrangements is virtually unlimited²³ and the 'degree of preferences' cannot be managed by the WTO.²⁴ The report strikes an ambiguous attitude when it reflects on PTAs. It seems to turn against a further proliferation, but it also recognizes that the WTO may not be fully able to meet members' aspirations. 'There are advantages to some amount of variation in obligations to avoid the "one size fits all" problems, and to provide opportunities for experimentation, innovation, and measures that have policy value, but which cannot be achieved in the context of so many Members'.²⁵

To a large degree PTAs demonstrate that this opportunity has already been taken: PTAs bring variation. In the context of creating a 'results-oriented institution' the report attempts to bring special trade arrangements firmly within the ambit of the WTO. The WTO should not passively wait and see how PTAs surface, but should create a supervisory framework within which the WTO oversees a system of variation. Accordingly, the report proposes a 'variable geometry', meaning that obligations under the WTO may differ for different members depending on the pace at which they want to promote trade liberalization. In this way the WTO takes effective command over a system of variable trade commitments. The report notes that the WTO has some experience in variable geometry through plurilateral agreements that members could accept voluntarily.²⁶ 'Taking the plurilateral route again would permit willing groups of members to take commitments on specific dossiers where no agreement of meaningful substance is likely'.²⁷

23. In theory, when each of the 148 WTO members concluded a bilateral trade agreement with another member the sum of agreements would be $147 + 146 + 145 \dots$; the result would be close to 10,000. This count leaves out multilateral agreements. In addition, trade benefits created under a PTA or the enabling clause are not limited in any way.

24. However, it should be kept in mind that under Art. XXIV para. 5, GATT customs unions and free trade areas – the most common PTAs – cannot introduce duties and other regulations of commerce higher or more restrictive than existing commitments under the WTO. This means that existing trade commitments cannot be affected by PTAs.

25. Sutherland Report, *supra* note 1, para. 293.

26. Agreement on Government Procurement and Agreement on Trade in Civil Aircraft, April 15, 1994, WTO Agreement, Annex 4.

27. Sutherland Report, *supra* note 1, para. 296.

While accepting this option the report rejects the ‘divisive approach that would enshrine a multiclass membership structure’.²⁸ Having said this, the realities of international trade diplomacy cannot be ignored. In the report a preference for a system in which trade liberalization with multiple speeds is developed under the WTO umbrella is clearly indicated. When a selected number of WTO members are enabled to move ahead, this

may dissuade the most powerful Members of the WTO from taking alternative routes in securing – or avoiding – trade liberalization with their trading partners. In particular it might diminish the attraction of regional and bilateral trade arrangements, especially those that fail to come close to the requirements laid down in the WTO.²⁹

In other words the report favours a multi-speed WTO in order to suppress a craving for PTAs. Accordingly, the report recommends that plurilateral approaches to WTO negotiations should be examined.

The report presents the GATS scheduling approach as a second option offering more variation in trade commitments. This implies that trade commitments (including market access) will be negotiated for each member individually. A GATS-like system means that the level of liberalization may vary for each member; the number of liberalization levels could be equal to the number of members. It is unclear how this could work for trade in goods. It could even be seen as a step back because the GATS does not automatically offer market access as was the case with GATT. It would also make the GATT less transparent. This is also recognized by the report: ‘the multiplicity of individual national commitments can be a complication for traders and investors that are active on a global scale’.³⁰ This is an understatement.

6. HORIZONTAL CO-OPERATION

The WTO is closely related to the Bretton Woods institutions. The IMF and the World Bank respectively give as their purposes ‘to facilitate the expansion and balanced growth of international trade’ and ‘to promote the long-range balanced growth of international trade’.³¹ These institutions share a common purpose – to facilitate or promote international trade. The degree of co-operation is, however, limited to some formal arrangements on data exchange and mutual representation. In general, international economic institutions appear to have a natural tendency to fend off outside interference in their jurisdictional territory. The IMF is a notorious example of this parochialism. It has persistently rejected international norms and standards other than those required to meet its own objectives. Accordingly, the IMF’s legal counsel has argued that human rights are not binding on the IMF because it is not party to

28. Ibid., para. 298.

29. Ibid., paras. 298–299.

30. Ibid., para. 302.

31. Art. I of the Articles of Agreement of the IMF and World Bank.

any human rights treaty and the IMF Articles of Agreement do not refer to human rights.³²

The report explains that the WTO is becoming more responsive in considering norms and rules beyond its own constitutive documents. It points out that Article V of the WTO Agreement empowers the General Council to 'make appropriate arrangements for effective co-operation' with intergovernmental organizations (IGOs) that have related responsibilities. Adjectives such as 'appropriate' and 'effective' indicate that co-operation must be more than just a formal arrangement. Exchange of information between IGOs and the incorporation of legal norms developed outside the WTO framework should create a rationalized system for international economic co-operation. Accordingly, the WTO dispute settlement bodies have applied exogenous rules and standards, including multilateral environmental treaties, the Vienna Convention on the Law of Treaties, and standards developed by the United Nations, the World Intellectual Property Organization (WIPO) and other international organizations. These standards and rules may enter the WTO legal system through various 'doors'. The reference to 'sustainable development' in the WTO Preamble has helped the Appellate Body to balance environmental conservation concerns against WTO commitments. Another development is the establishment of co-operative arrangements such as the Standards and Trade Development Facility (STDF), supporting projects for the development and implementation of standards on food safety and plant and animal life.³³

A close partner for co-operation is the IMF. The WTO and the IMF are complementary institutions in the sense that the WTO liberalizes trade and the IMF liberalizes current payments. More particularly, the IMF paves the way towards trade liberalization by promoting a stable monetary system. The report notes that under GATT the IMF took a rather dominant position towards trade issues, but the WTO had remedied this:

the idea was not to have the WTO adjusting in a subordinate manner to the policies of the IMF and the World Bank but for the WTO to insert through 'horizontal co-ordination' its agenda in those of the two powerful and long-established intergovernmental organizations.³⁴

These words reveal the desire to be treated equally.

While exploring common grounds for horizontal co-operation, the report attempts to set some firm limits:

the dispute settlement system of the WTO, due to its special characteristics and being self-contained in its jurisdictional responsibilities, offers no legal space for co-operation

32. But see F. Gianviti, 'Economic, Social and Cultural Rights and the IMF', address at the Seminar on Current Developments in Monetary and Fiscal Law, Washington DC, May 7–17, 2002. Prof. Gianviti is the IMF's legal counsel. <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf> (accessed 15 April 2005).

33. The STDF assists developing countries in enhancing their expertise and capacity to analyse and to implement international sanitary and phytosanitary (SPS) standards. The Facility was established by the Food and Agriculture Organization (FAO), the World Organization for Animal Health (OIE), the World Bank, the World Health Organization (WHO), and the WTO. See <http://www.standardsfacility.org/>.

34. Sutherland Report, *supra* note 1, para. 161.

with other international organizations except on a case-by-case basis derived from the right of panels to seek information.³⁵

In the same vein, the report continues, this applies to lawmaking and standard-setting. WTO law is *lex specialis* and 'cannot be changed from the outside by other international organizations that have different membership and different rules regarding the creation of rules'. This echoes the legalistic and narrow approach adopted by the Bretton Woods institutions.

7. THE DISPUTE SETTLEMENT SYSTEM

A major achievement of the WTO is the mandatory dispute settlement system, which has resulted in dozens of cases being decided by the Dispute Settlement Body. A typical WTO case goes through a number of phases. First, parties attempt to settle their dispute by diplomatic means. Second, should this fail, the aggrieved parties may request the establishment of a panel which will adopt a report on the dispute. Third, parties may appeal against a panel report before the Appellate Body. The Dispute Settlement Body will adopt reports of the panel and the Appellate Body, unless it decides by consensus not to adopt it. The Dispute Settlement Understanding also provides for rules that give the winning party a right to challenge the adequacy of measures taken by the losing party.

The dispute settlement system has gained a formidable reputation since the establishment of the WTO. Not only does it offer satisfaction to members harmed by trade actions, it also clarifies trade law and its relation to general international law. In the *Shrimp* case the Appellate Body even urged WTO members to negotiate an environmental treaty before quantitative restrictions for environmental reasons could be introduced. The environment celebrated a stealthy victory when the Appellate Body considered that the principle of sustainable development 'adds colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement'.³⁶ The report articulates that this is an area that the jurisprudence will need to develop further.³⁷ Decisions of panels and appellate bodies are clear and coherent, and generally provide detailed reasoning. The report finds that 'there exists much satisfaction' with the dispute settlement system, and cautions that further experience is needed before any dramatic changes can be undertaken. It is hard not to concur with this.

But there is also criticism. The dispute settlement bodies are accused of judicial activism. This is a logical consequence of the failure of WTO members to reach agreement on unambiguous texts. Panels and appellate bodies are not allowed to declare a *non liquet* and must sometimes dig deep to find the law. Members have also argued that the dispute settlement bodies ignored the delicate balance of politics and law. Traditionally, trade disputes have been resolved by diplomatic means rather

35. Ibid., para. 167.

36. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 153.

37. Sutherland Report, *supra* note 1, para. 236.

than by litigation, and in some disputes a member favoured a political compromise. The report rejects this argument and strongly opposes 'any political or diplomatic activity to interfere with the basic result so carefully arrived at by the relatively intense dispute settlement procedures'.³⁸ Problems also lie in compliance with decisions. The report suggests some remedies. When a losing party in a dispute fails to comply with a decision, the fallback position of the winning party is usually the 'suspension of obligations' or 'retaliation'.³⁹ This means that it is legitimate under current WTO rules to take trade-restrictive countermeasures which obviously frustrate the objectives of the WTO.

An alternative would be a system by which the losing party must offer monetary compensation, thereby preserving existing trade commitments. The report warns, however, that monetary compensation may only be 'a temporary fallback position pending full compliance, otherwise the "buy out" problem will occur'.⁴⁰ The report acknowledges that in the final analysis effective compliance 'really [depends] . . . on the general attitudes of WTO Members, particularly the very large and powerful among them. Those attitudes reflect a willingness – or lack of it – to support the credibility and fair operation of the dispute settlement system'.⁴¹ In plain language, the report asks members to be law-abiding. Although a 'general sense of satisfaction with the dispute settlement system' exists, more ideas for reforms have been proposed. These are procedural or of minor importance for the overall procedure and include an opportunity for the Appellate Body to remand a case for reconsideration by the panel, the right of NGOs to have *amicus* briefs accepted and considered by the dispute settlement bodies, and making dispute settlement procedures accessible to the public. Openness and transparency will benefit the WTO and the standing of its dispute settlement procedure.

8. CONCLUDING REMARKS

In the report concerns are voiced that have been expressed by free trade advocates, WTO members, and civil society or NGOs. The non-discriminatory nature of the WTO has been undermined, members fear loss of sovereignty, and civil society wants to be heard when the rules are set. Institutional improvements focus on a more streamlined dispute settlement system, effective horizontal co-operation, more effective decision-making, and strengthening the position of the WTO-bodies. Still, even taking into account the deficiencies, the achievements of the WTO have been impressive. It has allowed membership of non-state actors and has been innovative by introducing a dispute settlement system that works. It has given emerging economies a chance to enter the world market by offering a framework and platform for negotiations. Membership of the WTO makes a difference.

Trade liberalization is a complex process which triggers other mechanisms in international economic relations. Competition policy, protection of labour rights and

38. *Ibid.*, para. 254.

39. *Ibid.*, para. 240.

40. *Ibid.*, para. 243.

41. *Ibid.*, para. 245.

regulated monetary policies all matter in a fair and balanced world trading system. The report does not address these issues and in that sense it has only limited coverage. This report is the beginning of an ongoing debate on the future of the world trading system. However, before other areas are explored, questions need to be answered. What are the real benefits of trade liberalization? If no satisfactory answers are provided, a lack of legitimacy will eventually marginalize the WTO. In other words, the benefits of liberalization, now and in the future, must be demonstrable. Another point is the WTO's current legitimacy. The report even suggests improving its democratic legitimacy by parliamentary involvement. It mentions apropos a parliamentary assembly as part of the WTO system. Unquestionably this ambitious idea would be several steps ahead of what members are willing to accept, but it shows the WTO, more than other IGOs, as open to creating a global constitutional framework. The idea of a 'constitutional' WTO has gained much attention among scholars.⁴²

In its contribution to the debate on trade liberalization, the report focuses on economic consequences but fails to recognize that diversity and identity must be preserved. Globalization and trade liberalization means that from Alabama to Ulaanbaatar Heinz ketchup and Heineken beer drives local producers from the market. Many locally manufactured products have become collector's items.⁴³ More free trade may also mean that scarce natural resources are easily exhausted because of demand in the world markets. It is understandable that the report cannot rebut all the arguments, but it would make sense to think about globalization and prosperity on the one hand and ways of preserving diversity and local identity on the other. At least the report could have explained that trade liberalization on a global scale is not an irreversible force but an idea developed as part of economic theory and supported by a political elite.

A key problem of the WTO is the ineffective decision-making process caused by its current institutional framework. For persuasive reasons the report finds abandoning the consensus diplomacy to be undesirable, but it also recognizes that consensus frustrates progress in the legislative process. Arguably progress in the Doha negotiations is unlikely when 148 members must reach consensus on proposals for changing trade rules. Even an insignificant member could produce an effective veto if it has the stomach for it. Lack of progress in trade negotiations would eventually marginalize the WTO; members will ignore it and seek to establish closer trade relations with regional partners. Remedies for improving the decision-making process include a distinction between procedural and substantive issues; only the latter would require consensus. The report also suggests requiring members to invoke, in writing, 'a vital national interest' when breaking the consensus.

Since the decision-making process is a major flaw in the WTO system, the report should reflect a greater effort by the consultative board in giving direction for

42. For an attempt to define the constitutionalization of international trade law see D. Z. Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', (2001) 12 EJIL 39. For a more recent appraisal and literature on WTO constitutionalism see R. Howse and K. Nicolaidis, 'Deliberately Democratizing Multilateral Organizations', in M. Verweij and T. Josling (eds.), 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?', (2003) 16 (1) *Governance* 73.

43. See, e.g., the iconic work of Naomi Klein, *No Logo: No Space, No Choice, No Jobs* (2002).

institutional reform. A closer look could have been taken at other economic organizations, particularly the Bretton Woods institutions. An interesting option is a board of executive directors, of limited membership (about 25) but representing all WTO members. This body may carry out tasks assigned to it or delegated by the Ministerial Conference. Each director would represent a constituency of like-minded members. This would mean that members of one constituency would be forced to take a unified position, since its director could only speak with a single voice. Constituencies could be arranged through regional co-operation, although this is not necessarily a feasible approach. Alternatively, members sharing a common trade interest (agricultural producers, emerging economies, oil-exporting members) could join forces. Major trading partners (United States, European Union, China, Japan, India, Brazil) could be given the right to appoint their own director. If decision-making by consensus continues to be the rule, then there is no need to introduce a system of weighted voting.⁴⁴

The report's finding that the result of co-operation with other intergovernmental organizations on the whole has been positive is not convincing. In the discourse on the WTO–IMF relationship it should be recognized that trade liberalization and monetary stability are closely connected and justify a more intensive co-ordination between the IMF and the WTO. The report could have been more innovative in discussing the IMF–WTO relationship, that is, the link between trade restrictions (a WTO issue) and the need for macroeconomic adjustment when countries run into balance of payments difficulties (an IMF issue).⁴⁵

Many pressing questions remain. In the final analysis it is imperative that trade diplomats produce effective rules for the WTO to adjust to a changing environment. In which direction should the process of trade liberalization move? Will the global system eventually give way to regional arrangements? Should the WTO reflect only core rules on trade liberalization and leave specific commitments to preferential trade agreements? Is it feasible that the WTO oversees a system of preferential trade arrangements? Will the Dispute Settlement Body be able to preserve its authority and legitimacy when members turn their backs on the WTO?

44. This is similar to the constituency structure of the Bretton Woods institutions that has successfully operated since 1945. In this structure the largest five members each appoints a representative (on the Executive Board an executive director) and the rest of the members form voting groups and elect the other 20 executive directors. By this arrangement all 184 IMF members are represented on an Executive Board of 25. There is, however, one major formal difference with the WTO: the Bretton Woods institutions use a system of weighted voting. However, in practice voting hardly ever takes place, something also stipulated in rule C-10 of the IMF Rules and Regulations: 'The Chairman shall ordinarily ascertain the sense of a meeting *in lieu* of a formal vote.'

45. If developing countries had unimpeded access to world markets, many would never see the IMF. The UN Development Programme (UNDP), in its *Poverty Report* (2000), explains that developing countries pay a high price for protectionism over domestic agricultural production: 'Under the existing WTO agreement on agriculture, countries are obliged to lower tariffs, convert quotas to tariffs and reduce subsidies to their agricultural sectors. But developing countries argue that industrial countries have used both tariff and non-tariff barriers to restrict access to their agricultural exports – leading to annual losses in export earnings of \$700 billion. And industrial countries continue to charge higher tariffs on processed than on non-processed foods, frustrating developing country efforts to add value to agricultural exports.' www.undp.org/povertyreport/chapters/chap4.html (last accessed 7 July 2005).